Supreme Court, U.S.
FILED
00 771 SEP 9 2000
OFFICE OF THE CLERK

No.

IN THE
SUPREME COURT OF THE UNITED STATES

Billy R. EDWARDS,

Petitioner,

v.

HERSHEL W. GOBER, ACTING, SECRETARY, DEPARTMENT OF VETERANS AFFAIRS,

Respondent,

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

---

PETITION FOR WRIT OF CERTIORARI

Billy R. Edwards
Counsel of Record (Pro Se)
2416 S. 13th Street Apt.716
Temple, Texas 76504
Phone-254 742 2165

47pp

Questions Presented

1. Whether the district court erred in denying petitioner relief through default ?
2. Whether the district court erred in denying petitioner his right to engage in the discovery proceeding ?
3. Whether Petitioner produced evidence that his rejection was race based?
4. Whether affirmance by the court of appeals was inappropriate ?
5. Whether the court of appeals misapplied the standard of review dictated by Federal Rule of Civil Procedure 56 ?

Parties to This Proceeding

The names of all parties to this proceeding are contained in the caption of this case. Petitioner is an individual, not a corporate entity. See Supreme Court Rules 14. (b) and 29.6

Table of Contents

I. Questions Presented pg. i

II. Parties to this Proceedings pg. ii

III. Table of Authority pg. iii

IV. Opinions Below pg. 1

V. Statement of Jurisdiction pg. 1

VI. Constitutional Provisions, Statutes, Rules and Regulations pg. 1

VII. Statement of Case pg. 2

VIII. Reasons for Granting the Writ pg. 2

IX. Conclusion pg. 11

X. Appendix pg. 12

Table of Authority

(Cases)

Hospital Bldg. Co. v. Trustees of Rex Hospital 425 U.S. 738, 740 (1976). Pg. 10

Lytle v. Household Mfg. Inc. 494 U.S. 545 pg. 10

Matsushita Elec. Industrial Co. v. Zenith Radio Corp. 473 U.S. 574,587 pg. 10

McDonald v. Santa Fe Trail Transportation Co. 427 U.S. 273 (1976) pg. 7,8

McDonnell Douglas Corp., v. Green 411 U.S. 792 (1973) pg. 9

Thornley v. Penton Publishing Inc., 104 f.3d 26,29 (2nd Cir. 1997) pg. 9, 10

Opinions Below

The opinion of the Court of Appeals for the Fifth Circuit affirming the dismissal per curiam is unreported and set forth as appendix A to this petition. The opinion of the United States (U.S.). District Court, Western District of Texas is set forth as appendix B to this petition.

Statement of Jurisdiction

The court of appeals entered its judgment on July 13, 2000. This court has jurisdiction to review this petition pursuant to 28 United States Code (U.S.C.) 1254(1).

Constitutional Provisions, Statutes, Rules and Regulations

Federal Rule of Civil Procedures (Fed. R. Civ. P.) 6a. pg. 4

Fed. R. Civ. P. 12a. pg. 3

Fed. R. Civ. P. 55a. pg.4

Fed. R. Civ. P. 55b. pg. 4

Fed. R. Civ. P. 55e pg. 5

Title 5 U.S.C. 6103 pg.4

Title 28 USC 1254(1) pg. 1

Title 28 USC 1291 pg. 2

Title 42 USC 2000e-5 pg. 2

Statement of Case

This is a case where the employer, Department of Veteran Affairs, failed to apply the same criteria for a job announcement to members of all races and discriminated against petitioner. The central issues in this case is whether the employer failed to refer or select Petitioner to General Schedule positions because of his race. The Fifth Circuit of Appeals affirmed the District Court's decision rejecting Petitioner's argument that he was discriminated against base on race. If sustained, this ruling would produce a result that undermines the ability of victims of discrimination to enforce our Nation's laws forbidding age, race, gender, and national origin bias in employment matters. Jurisdiction was conferred on the U.S. District Court by 42 USC 2000e-5; U.S. Appeals Courts by 28 USC 1291

Reasons For Granting The Writ

The decision of the U.S. Fifth Circuit Court of Appeals in this case is in conflict with decisions of this court, other courts of appeals, and Federal Rules of Civil Procedure. The reasons for granting the writ of certiorari are as follows:

Reason 1.

Whether the district court erred in denying petitioner relief through default.

The U.S. Fifth Circuit Court of Appeal has sanctioned a departure by the U.S. District Court, Western District of Texas, Waco Division that is far from the accepted and usual course of judicial proceeding as to call for an exercise of this Court's supervisory power.

When a defendant has untimely appeared in a civil action the accepted and usual course of judicial proceeding is to take judgment by default against that party for the relief demanded in the complaint. See Appendix F pg. 27 . Proof of the respondent default is as follows:

Rule 12(a)(3) of the Federal Rule of Civil Procedures (Fed. R. Civ. P.), states "the United States or an officer or agency thereof shall serve an answer to the complaint or a cross-claim, or a reply to the counterclaim, within **60 days** after the service upon the United States attorney of the pleading in which the claim is asserted." The U.S. Attorney was properly served November 1,1999 and his answer to complaint was due December 31,1999. The Respondent admitted his answer was due on or before 31 December 1999. See Appendix D pg. 23; 24.

Respondent did not serve his answer (Defendant's Motion to Dismiss, or in the Alternative, for Summary Judgment) to the complaint upon plaintiff's attorney (Pro Se) until January 3, 2000, **63 days** after being served the

summons. See Appendix E pg. 26.

Friday December 31, 1999 does **not** meet the criteria of a legal holiday as defined by Title 5 U.S.C. §6103 or Rule 6. Time (a), of the Fed. R. Civ. P. (i.e., New Year's Day, Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States, or by the state in which the district court is held) therefore it must be included in the time computation.

Thus, Petitioner is entitled to judgment as a matter of law pursuant to the summons of civil case number W-99-CV-29 [see Appendix F pg. 27] and Fed. R. Civ. P.; Rule 55. Default. (a) Entry." When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise **the clerk shall enter the party's default."** The fact was made to appear by Appendix D pg. 23; 24 and E pg.26 that the respondent answer to complaint was served upon petitioner (pro se) three days late. According Rule 55 Default (b) "Judgment by default may be entered as follows: (1) When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, **the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and cost against the**

defendant, if the defendant has been defaulted for failure to appear and is not an infant or incompetent person"; Rule 55 Default (e) "No judgment by default shall be entered against the United States, or an officer or agency thereof unless the claimant establishes a claim." Respondent admits petitioner has established a claim against the U.S. agency involved. See Appendix G pg. 29.

Petitioner requested judgment and proffered an excerpt from the Fifth Circuit opinion making certain the amount requested in August 2000, stating the clerk had erred. The lower court ruled against this request. Fed. R. Civ. P. Rule 55 place no time restriction as to when this request should be made. The evidence shows the respondent answer to complaint was untimely. The letter of the law requires the clerk of the court to enter the respondent in default, grant petitioner relief demanded, and compels this court to grant a writ of certiorari to Petitioner based on this reason.

Reason 2

Whether the second erroneous sanction by the Fifth Circuit Court of Appeals denying Petitioner discovery is just. The accepted and usual course of judicial proceeding are (1) Complaint filed, (2) Answer filed, (3) Discovery proceeding. The district court actions in this case are contrary to the accepted trail progression of civil actions. After petitioner submitted a proposed scheduling order to the court as was required by local Rule CV-16©, the district court failed to enter a

scheduling order in accordance with Local Rule CV 16(a). The district court and the respondent failed to address the other Title VII claims in civil action No. W-99-Ca-029. The district court also refused to compel the respondent to participate in the discovery process as requested in petitioners' Motion to Compel.

Respondent refused to comply with petitioner discovery requests. See Appendix I pg. 31. The district court denied petitioner his right to discovery and arbitrarily granted respondent summary judgment 28 days after his answer to complaint was served upon petitioner. See Appendix C 22. For this reason the court is compelled to grant petitioner a writ of certiorari because Petitioner was denied due process under the law.

Reason 3

Whether petitioner produce evidence that his rejection was race based in case W-99-CA-29?

The Fifth Circuit stated in their decision of this case "Nor has Edwards produce a shred of evidence suggesting that his rejection was based on race." See appendix A pg. 12-15.

Petitioner proffered the evidence below to both lower courts as proof of race based rejection.

A different criterion was applied to black applicants for job announcement #96-68 than was applied to white applicants for the same job. The Black applicants had to have supervisory experience to qualify for the position. While white applicants could qualify for the position in

question with education (any master degree).

Appendix **J pg. 32-34** shows Ms. Brewer (a white applicant) was qualified for the position in question based on her master degree without a year of specialized experience at the next lower grade level.

Respondent may reject education as a qualifier and require supervisory experience to qualify for announcement No. 96-68 but this criterion must be applied to all races. It was not done in this case.

A white applicant (Ms. Jan Brewer) was allowed to use education and the time-in-grade requirement to qualify for the job in question, while the black applicant (Petitioner) was not allowed to use education and the time-in-grade requirement to qualify for the same job. See appendix J, K, and L pg.32-40. Ms. Brewer (a white applicant) did **not** have the one year of supervisory specialized experience at the next lower grade level for the position in question, which the respondent states is required. She was qualified and referred for the position in question lacking supervisory specialized experience. Therefore, Petitioner should **not** have been required to satisfy a supervisory qualification standard or have specialized experience at the next lower grade level. Because a white applicant was not restricted to these requirements.

In *McDonald v. Santa Fe Trial,* 477 US 273 the Supreme Court held: the same criterion must be "applied alike to members of all races," or Title VII

is violated. The Fifth Circuit acknowledged that one of the applicants referred for the position did not have supervisory specialized experience. The one was white, Ms. Brewer. Thus, respondent assertion that Petitioner lacked specialized experience as the reason for his rejection is without merit. Race based discrimination is established based on the fact that a different criteria was applied to black applicants than was applied to white applicants. See appendix A pg. 12-15; J and K pg. 32-37.

The Fifth Circuit decision that Petitioner presented no evidence of race based discrimination in this case conflicts with the relevant decision of this court in *McDonald v. Santa Fe Trail Trans. Co.* 477 U.S. 273. If a white applicant is allowed to substitute education for specialized experience, the black applicant must be allowed to do the same or Title VII is violated. Stare decisis compels this Court to adhere to the *McDonald* interpretations absent some special justification not to do so. This court granted a writ of certiorari on this same disparate treatment issue in *McDonald v. Santa Fe Trail Transp. Co.* 427 U.S. 273. and is compelled do the same for this case.

Reason 4

Whether summary affirmance by the court of appeals was inappropriate. Petitioner qualified for the position in question because he substituted education (a master degree) for experience to meet the criteria (qualification requirement) specified in

job announcement No. 96-68. Pursuant to the language of announcement No. 96-68, **if education is to be substituted for experience, transcripts must be on file or submitted with application in order to receive credit** indicating education could be substituted for the specialized experience requirement. Announcement #96-68 did not specify what the degree had to be conferred in, therefore any master degree is applicable. Petitioner satisfied the time-in grade requirement for the job, thus he qualified for the position in question. See Appendix K pg. 35-37 and L pg. 38-40.

Thornley v. Penton Publishing Inc. 104 F 3d 26, 29(2nd Cir. 1997) "states an individual is qualified for a position, for purpose of employment discrimination law, if he meets the criteria that the employer has specified for the position."

Petitioner qualified for the position in accordance with the criteria of the job announcement #96-68 and established a prima facie based on the McDonnell Douglas burden-shifting formula (i.e. He is a member of a protected class; he qualified for the position; he was not referred or selected; a white person was selected for the Waco position).

The respondent assertion, that Edwards lacks supervisory specialized experience as the reason for him failing to meet the minimum requirement for the position is refuted by the statement, **[first time(means no prior supervisory experience) supervisor must serve one year probationary period],** in job announcement 96-68 indicating

no supervisory experience is required. Thus proof of pretext is established. See appendix A and B and L. The Fifth Circuit Court of Appeals decision that "Edwards has presented no evidence suggesting that his qualifications were commensurate with those of the people that were referred" (i.e. that he qualified for the position in question) is in conflict with the decision of the Second Circuit Court of Appeals in *Thornely v. Penton Publishing Inc.* 1044 f 3d 26,29 (1997). Thus, certiorari must be granted to resolve this conflict among the Courts of Appeals.

Reason 5.

Whether the Fifth Circuit misapplied the standard of review dictated by Rule 56. "The court must review all of the evidence in the record", e f., e.g. *Matsushita Elec. Industrial Co. v. Zenith Radio Corporation.*, 473 U.S. 574, 587, "drawing all reasonable inferences in favor of the nonmoving party but making no credibility determinations or weighing any evidence", e.g., *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 554-555. "Because the District Court dismissed this case on the pleading, we take as true the materials facts alleged in petitioners' complaint", .e. g., *Hospital Bldg. Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 740 (1976).

To take as true Petitioners' allegations in complaint is to say he established the genuine issue of material fact that he was a victim of race-based discrimination, therefore a trial is required and summary judgment for respondent was

inappropriate. The U.S. Fifth Circuit Court of Appeals decision that summary judgment for the respondent in this case is just, conflicts with the relevant decisions of this Court stated in this reason. Thus, this court is compelled to grant petitioner a writ of certiorari.

Conclusion

For the reasons stated herein, in order for due process to be preserved and justice to prevail, Petitioners' writ of certiorari should be granted.

Billy R. Edwards
Counsel of Record (Pro Se)
2416 S. 13th Street Apt. 716
Temple, Texas 76504
Phone (254-742-2165)

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-50182 **Filed Jul 13,2000**
Summary Calendar
Charles R. Fulbruge III
Clerk

BILLY R. EDWARDS,

Plaintiff-Appellant

versus

TOGO D. WEST, Secretary,
Department of Veterans Affairs,
Defendant-Appellee

Appeal from the United States District Court for
the Western District of Texas
USDC No. W-99-CA-029

Before JOLLY, JONES, and BENAVIDES, Circuit Judges.
PER CURIAM:*

Billy Edwards, pro se, has brought a race discrimination claim against Togo West, Secretary for the Department of Veterans Affairs, seeking $750, 000,000. Edwards charges that he was denied a promotion to "Supervisory Clerk" due to race discrimination.

---

*Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

The district court ruled for West on Summary judgment, holding that Edwards had failed to establish a prima facie case of discrimination and to carry his burden of proving that the reasons given for denying Edwards the job were not merely pretextual. Edwards appeals this judgment. For the reasons stated herein, the district court decision is affirmed.

I

In the summer of 1996, Edwards, an African-American, was a Food Service Worker at the Marlin Integrated Clinical Facility of the Department of Veterans Affairs Central Texas Veterans Health Care System. His duties consisted mainly of checking patient's food trays, delivering them, and cleaning the kitchen. The level of this position was "GS-2," with Wage Grade 2, step 2.

On June 11, 1996, Edwards responded to Job Notification #96-68 and applied for the position of Supervisory Clerk, Customer Service, GS 303-8, Target 10. Twenty-one people applied for the job. Eight were African-American, eleven were white, and two were Hispanic.

Guadalupe Gonzalez in the Human Resources Management office reviewed Edwards's application. She sent Edwards a memo

explaining that he lacked the required experience on July 19, 1996. Of the six people later referred for the position, two were African-American[1]. At least five had prior supervisory experience.

Edwards filed a complaint with the EEOC, but the EEOC untimely denied him relief. Edwards then brought suit in federal court, charging violations of Title VII[2]. The district court dismissed on summary judgment, holding that Edwards had failed to establish a prima facie case and that the reason for denying him referral was not pretexual. Edwards filed a timely appeal.

II

A

Because we are reviewing a summary judgment determination, we use the same standard as the one employed by the district court, Williams v. Time Warner Operation. Inc., 98 F 3d 179 , 181 (5th Cir. 1996) . Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any 3d

---

[1]A referral list, often referred to as the "best qualified list" is a list of those qualified and eligible applicants who have undergone a further, more strigent screening process. Edwards's complaint is that he was not on this list, and was therefore not ultimately offered the position.

[2]Edwards also brought claims based on 42 U.S.C. 1981. But as the district court noted, because Edwards was a federal employee, Title VII provides the exclusive scheme for charges of employment discrimination. Pfau v. Reed, 125 F.

927, 932 (5th Cir. 1997). material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56©. We construe all evidence in the light most favorable to the non-moving party without weighting the evidence, assessing its probative value, or resolving any factual disputes. See Lindsey v. Prive Corp., 987 F 2d 324 n.14 (5th Cir. 1993) .

B

We agree with the conclusion reached by the district court. Edwards has presented no evidence suggesting that his qualifications were commensurate with those of the people that were referred. As west points out, Edwards lacked supervisory experience. Nor has Edwards produce a shred of evidence suggesting that his rejection was based on his race. Because Edwards has to present a genuine issue of material fact, the resolution of which would entitle a jury to rule in his favor, summary judgment was appropriate.

III

For the reasons stated herein, the district court's judgment is

AFFIRMED

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

BILLY EDWARDS
Plaintiff,
v. **CA NO. W-99-CA-029**

TOGO D. WEST, JR., Secretary
of Department of Veterans Affairs,
Defendant,

ORDER

Plaintiff brings this action under the provisions of Title VII of the Civil RIGHTS Act of 1964 ("Title VII"), as amended, 42 U.S.C. §2000e,et seq. He asserts that he was not selected for a position as a Supervisory Clerk because of his race. Defendant moved, alternatively, to dismiss claims and for summary judgment. Having reviewed Defendant's motion and Plaintiff's response, the Court has determined the motion is meritorious and should be granted.

I. BACKGROUND

The uncontroverted summary judgment proof establishes the following: Plaintiff was employed

at the Department of Veterans Affairs Central Texas Veterans Health Care System, Marlin Integrated Facility ("Marlin facility") as a Food Service Worker, Wage Grade 2, step 2 (GS-2). His duties consisted mainly of checking patient's food trays to make sure they were in proper order. He also delivered the trays to the patients and helped clean the kitchen. Despite the menial nature of his duties, Plaintiff possessed an undergraduate degree in Business and Management, as well as a Master's Degree in Business Administration.

On June 11, 1996, Plaintiff applied for the position of Supervisory Clerk, Customer Service, GS 303-8, Target 10. Guadalupe Gonzalez, a personnell special in the Human Resources Management ("HRM") office, reviewed the application and determined that Plaintiff was not qualified due to lack of specialized experience. Defendant's Exhibits 2 and 3. One of the requirements for the Supervisory Clerk position at the GS-8 level, which are established by the U.S. Office of Personnel Management. Is that the applicant have at least one year of specialized experience (supervising) equivalent to at least the next lower grade of GS-7. Plaintiff did not have this experience. The successful applicants had supervisory experience. Defendant's Exhibit 4.

I. SUMMARY JUDGMENT

Summary judgment should be granted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine

issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P.56©. A disputed material fact is genuine if the evidence is such that a jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986). The initial burden to demonstrate the absence of a genuine issue concerning any material fact is on the moving party. Celotex v. Catrett, 477 U.S. 317, 325 (1986). This burden can be satisfied by pointing out to the district court that there is an absence of evidence to support an essential element of the non-moving party's case. Id. Upon such showing, the burden shifts to the non-moving party to established that there is a genuine issue. Id. At 324. "[T]he plain language of Rule 56© mandates the entry of summary judgment, after adequate time for discovery and upon motion ,against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial." Id. at 322.

I. DISCUSSION

In order to prevail on a claim of sex, race or age discrimination, the plaintiff bears the burden of proving that the defendant intentionally discriminated against him. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 113 S Ct. 2742 (1993). The plaintiff may prove his case by offering direct evidence of intentional discrimination. See Portis v. First Nat'l. Bank of

New Albany. 34 F.3d 325,328 n.6 (5th Cir. 1994). "Direct evidence of discrimination is evidence which, if believed, would prove the existence of a fact (i.e. unlawful discrimination) without any inferences or presumptions." Bodenheimer v. PPG Indus. Inc., 5F3d 955, 958 (5th Cir. 1993). There is no direct evidence of discrimination presented by Plaintiff in the present case.

Because direct evidence of discrimination is so rare, a plaintiff may present circumstantial proof of discrimination through the burden-shifting analysis first outlined in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Nichols v. Loral Vought Systems Corp. 81 F .3d 38, 40 (5th Cir 1996). Once the plaintiff establishes a prima facie case, he creates a rebuttable presumption, or inference, of discrimination, and the burden of production shifts to the defendant to articulate a legitimate, non-discriminatory reason for the adverse action taken against the plaintiff. Mayberry v. Vought Aircraft Co., 55 F.3d 1086, 1089 (5th Cir. 1995). See also U.S. Postal Service Bd. Of Governors v. Aikens, 460 U.S. 711 (1983); McDonnell Douglas Corp. v. Green, 411U.S. 792 (1973). If the defendant does offer a non-discriminatory reason for its employment decision, the burden then shifts back to the plaintiff to prove that the reason offered by the defendant was not its true reason, but was merely a pretext for discrimination. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1980). A reason is deemed a pretext if the plaintiff shows "both that the reason was false, and that discrimination was the real reason." St.

Mary's Honor Center v. Hicks, 113 S.Ct. at 2752 (emphasis in original). Once a nondiscriminatory reason is given "the presumption of discrimination derived from the plaintiff's prima facie case 'simply drops out of the picture,' and 'the ultimate question [is] discrimination vel non." Mayberry, 55 F.3d at 1090, citing St. Mary's Honor Center v. Hicks, 113 S.Ct. at 2749 and 2753.

The elements required to establish a prima facie case must , of necessity, vary with the specific facts of a particular case. McDonnell Douglas, 411 U.S. at 802,n.13. In a typical discrimination suit, the plaintiff establishes a prima facie case by showing: (1) he belongs to a protected class; (20he was subject to an adverse employment decision; (3) he was qualified for the position held or sought; and (4) he was replaced by someone outside of his protected class, or those outside the protected class were treated more favorable. Ross v. University of Texas at San Antonio, 1439 F.3d 521, 526 (5th Cir. 1998).

Even assuming that Plaintiff has established a prima facie case of discrimination, which he failed to do, he has failed to carry his burden of proving that the Defendant's reasons for not selecting him for the supervisory position were merely a pretext for discrimination. At least two of the successful applicants for the available supervisory position were of the same race as Plaintiff. Additionally, the successful applicants had supervisory experience that Plaintiff lacked.

Plaintiff attempts to also bring his claims under 42 U.S.C. §1981. However, his claims are limited to Title VII. See Pfau v. Reed, 125 F.3d

927, 932 (5th Cir. 1997) (Title VII provides the "exclusive, pre-emptive administrative and judicial scheme for the redress of federal employment discrimination"). Additionally, while Plaintiff asserts that he applied for a GS-9 position, in which education may substitute for experience, rather than a GS-8 position, he still did not possess the necessary qualifications. Accordingly, it is

ORDERED that the Defendant's Motion to Dismiss, or in the Alternative, for Summary Judgment is **GRANTED**. It is further

ORDERED that Plaintiff's Motion for Summary Judgment is **DENIED**. It is further

ORDERED that any motions not previously ruled upon by the Court are **DENIED**.

SIGNED this 1st day of February, 2000.

Signed--**WALTER S. SMITH, JR.**

United Stated District Judge

Appendix C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
WACO DIVISION

BILLY EDWARDS

Plaintiff,

v. CIVIL NO. W.99-CA-29

TOGO D. WEST , JR., Secretary,
Department of Veterans Affairs
Defendant,

JUDGMENT

In accordance with the Court's Order granting Defendant's Motion to Dismiss, or in the Alternative, for Summary Judgment, the Court enters its Judgment as follows:

IT IS ORDERED, ADJUDGED AND DECREED that Plaintiff take nothing in his claim against Defendant.

IT IS FUTHER ORDERED, ADJUDGED AND DECREED that any relief not specifically granted in this Judgment is hereby **DENIED.**

SIGNED this 1st day of February, 2000.

WALTER S. SMITH, JR.

United States District Judge

Appendix D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
WACO DIVISION

BILLY EDWARDS
Plaintiff,

v. CIVIL NO. W.99-CA-029

TOGO D. WEST , JR., Secretary,
Department of Veterans Affairs
Defendant,

MOTION FOR EXTENSION OF TIME To RESPONDTO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

COMES NOW the Defendant Togo D. West, Secretary, Department of Veteran Affairs, and respectfully request an extension of time within which to respond to Plaintiff's motion for summary judgment and in support would show the following:

Plaintiff filed this Title VII case on January 25, 1999. (DKT.#1). On September 21, 1999, the Court denied Plaintiff's motion for a default judgment because Plaintiff had not properly served the defendant. (DKT.#5). On November 1, 1999, Plaintiff properly served the U.S. Attorney. (DKT.#10).

Under Rule 12(a) of the Fed. R. Civ. P., the

United States, its agencies, and/or employees who are sued in civil actions have sixty days within which to answer, plead or otherwise respond to suits brought against them for actions taken under the color of law or lawful authority. See. Dickens v. Lewis, 750 F 2d 1252, 1255 (5th Cir. 1984); see generally, Williams v. Collins, 728 F.2d 721,723-24 (5th Cir. 1984). Therefore, the Defendant's responsive pleading is due on or December 31,1999.

On November 17, 1999, Plaintiff filed his motion for summary judgment, which was received by the undersigned on November 16, 1999. (DKT. #13). Defendant's response is due on or before November 29, 1999.

As of this date, the undersign has not yet received the litigation report from the administrative agency. The information contained in the report will be necessary to adequately respond to Plaintiff's motion for summary judgment. It is anticipated that the litigation report will be provided to the undersign no later than December 13, 1999. In addition, the undersign will be performing two weeks of Army Reserve duty beginning Saturday, November 27, 1999. Based on the foregoing, the Defendant respectfully requests that his response to Plaintiff's motion for summary judgment become due on December 31, 1999, the date his responsive pleading is due.

This request is not made for the purpose of delay, but so the Defendant can adequately respond to Plaintiff's motion.

Respectfully submitted,

JAMES WILLIAM BLAGG
UNITED STATES ATTORNEY

Signed-- By:
R. BARRY ROBINSON
Assistant U.S. Attorney
816 Congress Avenue, Suite 1000
Austin, Texas 78701
(512) 916-5858/ 916-5854 FAX
Arkansas State Bar No. 85206

Appendix E
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Defendant's Motion to Dismiss, or in the Alternative, for Summary Judgment has been mailed by Certified Mail, Postage Prepaid, on this 3rd day of January, 2000, addressed as follows:

Billy R. Edwards
2416 South 13th Street
Apt. 716
Temple, Texas 76504

Signed-- **Gary L. Anderson**
Assistant United States Attorney
Western District of Texas
601 N.W. Loop 410, Suite 600
San Antonio, Texas 78216

Appendix F

AO 440 (REV. 10/93) Summons in a Civil Action
UNITED STATES DISTRICT COURT
Western District of Texas
Waco Division

Billy Edwards

SUMMONS IN A CIVIL CASE
CASE NUMBER: W-99-CV-29

V.

Togo D. West, Secretary,
Department of Veterans Affairs

TO: (name and address of defendant)
James W. Blagg
Att: Civil Process Clerk
U.S. Attorney's Office
601 NW Loop 410, Suite 600
San Antonio, Texas 78216

You are hereby summoned and required to serve upon Plaintiff's attorney (name and address).

Billy Edwards (Pro Se)
2416 South 13th Street
Apt. 716
Temple, Texas 76504

An answer to the complaint which is herewith served upon you, within **60** days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default

will be taken against you for the relief demanded in the complaint. You must also file your answer with the Clerk of this Court within a reasonable period of time after service.

WILLIAM G. PUTNICKI
CLERK

OCT 29 1999
Date

Sign--By Mary C------Deputy Clerk

Appendix G

United States Department of Justice
United States Attorney
Western District of Texas
601 NW Loop 410 STE 6000
San Antonio, Texas 78216

January 20, 2000

Mr. Billy Edwards
2416 13th Street
Apt. 716
Temple, Texas 76504

Re: Billy Edwards, v. Togo D. West, Jr., Secretary, Department of Veterans Affairs. Civil Action No. W-99-CA-029

Mr. Edwards:

Reference your Motion for Discovery forwarded with your Opposition to Motion for Dismissal.

Please be advised that discovery must be done in accordance with Federal Rules of Civil Procedure, 26(d). 33, and 34 and generaly, in addition to these rules, discovery does not began until a scheduling order has been entered by the court. Also discovery matters are not filed with the court.

In specific response to your present discovery request, you are hereby advised that Defendant objects to both your request for production and interrogatories. As you noted in your Opposition

to Motion for Dismissal, Defendant's position with the court is a that the only valid claim you have before the court involves Announcement No. 96-68. As none of your discovery request involve No. 96-68 that information would not be relevant and therefore not discoverable. The case you cited in your Opposition. Patterson. Supports our position on exhaustion. See page 181 top of page. Therefore until there has been compliance with Fed. R. Civ. P. 26(d), a scheduling order has been issued, and the court has ruled in your favor on claims other than No. 96-68, Defendant objects and can not comply with your discovery request.

Sincerely,
JAMES WILLIAM BLAGG
United States Attorney
Sign--By:
GARY L. ANDERSON
Assistant U.S. Attorney

Appendix I

United States District Court
Western District of Texas
Waco Division

IMPORTANT REMINDER

After all defendants named in your complaint have been served, and have filed their answer, you may begin the discovery process. Service of discovery should be made only upon defendant's counsel, not the defendant himself. You are entitled to conduct discovery, the procedural method designed to gather relevant information from those you have named as defendants. However, you should remember that waiting until the answers have been served and filed enables the discovery procedure to operate as smoothly and economically as possible.

Appendix J

Veterans Administration Record of Minimum qualification Determination For General Schedule Position and Merit Promotion Point Credit

Name of Applicant	Position applied for
Brewer, Jan K.	Supv. CLK (5 pos) GS-303-8(t9,10)
Organ. Location or position	Vac. Anno. No.
Cust Svc.	96-68

MINIMUM QUALIFICATION REQUIREMENTS

Qualification Standard used	Type and amount of education required		
General experience		Specialized Experience Equ. To next lower grade	
Required		Required	
Years	Months	Years	Months
GS-8,9,10	one year equivalent to at least next lower level		

RECORD OF MINIMUM QUALIFICATION DETERMINATION

Note: The determination made below are based on the best judgment of the signing official related to a specific time. They are NOT to be automatically substituted in other actions, even for an identical vacancy; and are not binding for other vacancies. Final decisions concerning the interpretation and application of qualification standards are reserved to those officials who are authorized to make them.

General Experience

Title Series and Grade (title and salary for non-

Gov't) Source From To

(OPF,SF-171)

Medical technologist GS-644-9 OPF 3-30-86 to Present
Medical Technologist GS-644-7 OPF 7-31-81 to 9-14-84
Medical technologist GS-644-7 OPF 3-30-81 to 5-15-81
Medical Technologist GS-644-7 OPF 11-18-79 6-9-80

Total General Experience 14+years

Specialized Experience

Title Series and Grade (title and salary for non-Gov't) Source From To

(OPF,SF-171) (date) (date)

Total Specialized Experience **None**

Note: The space above for general and specialized experience may be modified for recording minimum qualifications documentation for KSAO type standard.

EDUCATION

Description of Education Master's in Health Svc. Mgmt date completed 12/95

Total experience for which education is substituted Type of experience education is

OTHER REQUIREMENTS

Type of requirements satisfied

Time-after-competitive-appointment

supervisory standard **X** time-in-grade

licensure

QUALIFICATION DETERMINATION

X qualified Grade(s) GS9t10 not qualified grade(s)

I certify to the best of my knowledge this qualification determination is correct.

VA Form 5-3493

Signed---G Gonzalez 6-27-96.

Appendix K

Veterans Administration Record of Minimum qualification Determination For General Schedule Position and Merit Promotion Point Credit

Name of Applicant	Position applied for
Edwards, Billy	Supv. CLK (5 pos) GS-303-8(t9,10)
Organ. Location or position	Vac. Anno. No.
Cust Svc.	96-68

MINIMUM QUALIFICATION REQUIREMENTS

Qualification Standard used	Type and amount of education required		
General experience	Specialized Experience Equ. To next lower grade		
Required		Required	
Years Months		Years Months	
GS-8,9,10	one year equivalent to at least next lower level		

RECORD OF MINIMUM QUALIFICATION DETERMINATION

Note: The determination made below are based on the best judgment of the signing official related to a specific time. They are NOT to be automatically substituted in other actions, even for an identical vacancy; and are not binding for other vacancies. Final decisions concerning the interpretation and application of qualification standards are reserved to those officials who are authorized to make them.

General Experience

Title Series and Grade (title and salary for non-

Gov't) Source From To

(OPF,SF-171)

Food service worker WG 7408-2 OPF 12-11-94 to Present
Clerk/landscaping SF-171 ten months

Total General Experience 2+years

Specialized Experience

Title Series and Grade (title and salary for non-Gov't) Source From To

(OPF,SF-171) (date) (date)

Total Specialized Experience **None**

Note: The space above for general and specialized experience may be modified for recording minimum qualifications documentation for KSAO type standard.

EDUCATION

Description of Education Master's in Business Administration date completed 12/93

Total experience for which education is substituted Type of experience education is substituted.

Years months general specialized

OTHER REQUIREMENTS

Type of requirements satisfied

Time-after-competitive-appointment

supervisory standard **X** time-in-grade

licensure

Remarks (Reason for non-qualification, classification, explanation) Does not have specialized experience at the next lower grade.

QUALIFICATION DETERMINATION

qualified Grade(s) **X** not qualified grade(s) GS-8-9-10)

I certify to the best of my knowledge this qualification determination is correct.

VA Form 5-3493

Signed---G Gonzalez 7-8-96.

Appendix L

"Vacancy Announcement
Department of Veterans Affairs Central Texas Veterans Health Care Systems (CTVHCS)
Announcement No. 96-68 Opening Date:6-4-96
Closing Date: 6-14-96

Position:	Organizational Location:
Supervisory Clerk(5Positions) GS-8 (target 9, 10) or GS-9 (target 10) or GS-10	Customer Service Duty site: Austin, Marlin, Temple, Waco

This position is a one-grade interval position, at the GS-8 level, incumbent will be promoted to GS-9 when time-in-grade, qualification standards, and satisfactory job performance have been met.

Salary Range	Area of Consideration
GS-8 $27,256-$35,438 Per Annum GS-9 $30,106-$39,140 Per Annum GS-10 $33,154- $ 43,097 Per Annum (Includes 4.13% locality comparability pay)	Employee of CTVHCS

Duties and responsibilities: The incumbent is a member of Customer service staff assigned in a mid-management capacity to manage, direct, supervise and administer a variety of complex, substantive, administrative and technical functions. Provide technical administrative assistance, advice and support to the Chief Customer Service through a fully-developed, comprehensive patient administrative management program. Responsible for the development, implementation, direction and

execution of all activities relating to reception, eligibility, scheduling, admission and clinic support of patients in accordance with VA Manual M-1 Part 1 and DVA directives. Responsible for direction, administration, scheduling, and supervision of all staff assigned to the Primary Clinic/Specialty Clinic activity at the assigned ICF. Establishes procedures for data validation. Manages the budgetary allocation for Beneficiary Travel and Special Service Fund Control Point. Responsible for the administration of such other programs as correct bed inventory; bed availability for treatment needs; compassionate and sympathetic explanation of death and burial benefits to family and next of kin; evaluate and resolution for computer-related problems. Note; the incumbent selected for the supervisory position at Marlin will be required to rotate to Temple and Waco IFC's a minimum of 25% of total work time

Qualification Requirements: Qualifications are derived from Office of Personnel Management Qualification Standard Requirements for Clerical and Administrative Support Positions, available in Human resources Management Service. At the GS-8 level, must have at least one year specialized experience equivalent to at least the next lower grade of GS-7. At the GS-9 level, must have at least one year specialized experience equivalent to at lease the next lower grade level of GS-8. At the GS-10 level, must have at least one year specialize experience equivalent to at least the next lower grade level of GS-9. Specialized

experience is experience which is directly related to the position to be filled and which has equipped the candidate with the particular knowledge, skills and abilities to perform successfully the duties of the position. **FIRST TIME SUPERVISORS MUST SERVE A 1-YEAR PROBATIONARY PERIOD. IF EDUCATION IS TO BE SUBSTITUTED FOR EXPERIENCE, TRANSCRIPS MUST BE ON FILE IN OFFICIAL PERSONNEL FOLDER (OFP) OR SUBMITTED WITH APPLICATION, IN ORDER TO RECEIVE CREDIT**. To apply at the GS-8 level, must have one year at the GS-7 level in federal service in order to meet time-in-grade. Applicants must indicate on VA form 5-4078 the grade level(s) for which they wish to be considered."

Note: This is a direct quote of the Department of Veterans Affairs, Central Texas Veterans Health Care System vacancy announcement No. 96-68.

Appendix M

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-50182
Summary Calender

D.C. Docket No. W99-CV-29

U.S. Court of Appeal
Filed Jul 13,2000
Charles R. Fulbruge III
Clerk

Billy R. Edwards
Plaintiff-Appellant

v.

Togo D. West, Secretary
Defendant- Appellee

Appeal from the United States District Court for the Western District of Texas, Waco

Before Jolly, Jones, and Benavides, Circuit Judges

JUDGMENT

This cause was considered on the record on appeal and the briefs on file.

It is ordered and adjudged that the judgment of the district Court is affirmed.

It is further ordered that plaintiff-appellant pay defendant-appellee the cost on appeal to be taxed by the Clerk of this Court

Appendix N

Rule 12(a)(3) of the Federal Rule of Civil Procedures (Fed. R. Civ. P.)"the United States or an officer or agency thereof shall serve an answer to the complaint or a cross-claim, or a reply to the counterclaim, within **60 days** after the service upon the United States attorney of the pleading in which the claim is asserted."

Rule 6. Time (a), of the Fed. R. Civ. P. **(5 USC 6103)** "As used in this rule and in Rule 77c legal holiday include New Year's Day, Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States, or by the state in which the district court is held".

Fed. R. Civ. P.; **Rule 55. Default. (a)** Entry. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise the clerk shall enter the party's default; **Rule 55 Default (b)** Judgment by default may be entered as follows: (1) When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment

for that amount and cost against the defendant, if the defendant has been defaulted for failure to appear and is not an infant or incompetent person; **Rule 55 Default (e)** No judgment by default shall be entered against the United States, or an officer or agency thereof unless the claimant establishes a claim".

Title 28 USC 1254(1)" Cases in the courts of appeals may be reviewed by the Supreme Court by the following method: (1) By writ of certiorari upon the petition of any party to any civil case".

Title 28USC 1291 "The courts of appeals (other than the United States Courts of Appeal for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States".

Title 42USC 2000e-5(a) "Power of Commission to prevent unlawful employment practices. The Commission is empowered, a hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title".